IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

WORD MUSIC, LLC, et al.,	)	
	)	
Plaintiffs,	)	**CASE NO. 3:07-cv-0502**
	)	**JUDGE HAYNES**
v.	)	**JURY DEMAND**
	)	
PRIDDIS MUSIC, INC., et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO STRIKE DECLARATION OF RICHARD L. PRIDDIS

Come now Defendants Priddis Music, Inc., Richard L. Priddis and Prosound Karaoke, Ltd. (hereinafter the "Priddis Defendants"), by and through undersigned counsel, and hereby submit this Memorandum of Law in Opposition to the Plaintiffs' Motion to Strike the Declaration of Richard L. Priddis.

I. ARGUMENT

A. The Motion Should Be Denied Based on the Priddis Defendants' Motion to Dismiss.

On or about June 1, 2007, the Priddis Defendants filed a Motion to Dismiss this action, based on lack of personal jurisdiction and improper venue, and the Court has not ruled on the Motion. Therefore, the Priddis Defendants continue to rely on the arguments contained in their Motion to Dismiss (and their Reply relating thereto), and assert that the Plaintiffs' Motion to Strike the Declaration of Richard L. Priddis should be denied. Nothing stated herein shall be construed as a waiver of the objections set forth in detail by the Priddis Defendants in their Motion to Dismiss.

Dockets.Justia.com

In addition, on or about July 9, 2007, at the initial case management conference, the Court declined to schedule deadlines in this case, pending its decision on the Priddis Defendants' Motion to Dismiss. According to the Clerk's Resume of Proceedings, the Court did not provide counsel with a timeline as to when it would rule on the Motion to Dismiss.

B. Rule 12(f) Does Not Permit the Plaintiffs to Strike Statements Contained in Declarations.

Rule 12(f) of the Federal Rules of Civil Procedure provides as follows:

> Upon motion made by a party before responding to a *pleading* or, if no responsive *pleading* is permitted by these rules, upon motion made by a party within 20 days after the service of the *pleading* upon the party or upon the court's own initiative at any time, the court may order stricken from any *pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. (emphasis supplied).

Rule 12(f) refers exclusively to and, therefore, applies exclusively to, striking defenses and other specific matters contained in pleadings. A "pleading" is a "formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials, or defenses." Black's Law Dictionary 1173 (7th ed. 1999). Rule 7(a) of the Federal Rules of Civil Procedure defines the term "pleading" more specifically and in pertinent part as follows:

> There shall be a complaint and an answer; a reply to a counterclaim . . . ; an answer to a cross-claim . . . ; a third-party complaint . . . ; and a third-party answer . . . . *No other pleading shall be allowed*, except that the court may order a reply to an answer or a third-party answer. (emphasis supplied).

A declaration filed in opposition to a motion is not a pleading, and Rule 12(f) does not contemplate striking statements contained in declarations.

C. In the Alternative, the Plaintiffs Fail to Satisfy Rule 12(f).

The Priddis Defendants filed the Declaration of Richard L. Priddis on or about July 17, 2007. The Plaintiffs, however, failed to file their Motion to Strike within the 20-day window set forth in Rule 12(f), waiting to file their Motion until August 10, 2007. The Motion, therefore, should be denied, as it is untimely. Further, the Plaintiffs' Motion fails to identify any of the criteria necessary to support a motion to strike. Specifically, the Plaintiffs fail to establish, or even to assert, that the Declaration of Richard L. Priddis contains any redundant, immaterial, impertinent or scandalous matter.

D. The Best Evidence Rule is Inapplicable to the Declaration of Richard L. Priddis.

Rule 1002 of the Federal Rules of Evidence (the "best evidence" rule) requires a party to use an original when seeking to "prove the content of a writing, recording, or photograph." The United States District Court for the District of Delaware has held in pertinent part as follows concerning the best evidence rule:

> The "best evidence" rule . . . comes into play only when the terms of a writing are being established and an attempt is made to offer secondary evidence, i.e., a copy, to prove the contents of the original writing. *The rule is not applicable when a witness testifies from personal knowledge of the matter*, even though the same information is contained in a writing.

D'Angelo v. United States, 456 F.Supp. 127, 131 (D.Del. 1978) (emphasis supplied) (copy attached). In U.S. v. Conteh, the United States Court of Appeals for the Sixth Circuit followed the D'Angelo decision, holding in pertinent part that "the best evidence rule does not apply here because the witnesses testified from their personal knowledge." U.S. v. Conteh, 2007 U.S. App. LEXIS 9702, *28 (copy attached).

The Plaintiffs assert that the best evidence rule requires the Priddis Defendants to submit original or duplicate licenses as attachments to the Declaration of Richard L. Priddis. The Declaration of Richard L. Priddis, however, does not seek to prove the contents of any writing but, rather, offers testimony concerning Defendant Priddis' personal knowledge of the existence of licenses[1] relating to the "subject works."

E. In the Alternative, the Priddis Defendants Satisfy Exceptions to the Best Evidence Rule.

Rule 1006 of the Federal Rules of Evidence provides in pertinent part that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation . . . ." As set forth in Paragraph 3 of the Declaration of Richard L. Priddis, the Priddis Defendants have purchased hundreds of licenses relating to the "subject works" which are at issue in this matter. Even if the best evidence rule applies to the Declaration of Richard L. Priddis, Defendant Priddis utilized the exception contained in Rule 1006 by submitting charts identifying licenses in lieu of submitting the voluminous licenses themselves. See Exhibits A and B to Declaration of Richard L. Priddis.

Further, Rule 1004(3) of the Federal Rules of Evidence provides that an original is not required if it is in the possession of the opponent. Agencies, such as the Harry Fox Agency, serve as licensing agents for the Plaintiffs and are the entities from whom the Priddis Defendants received licenses. See Exhibit A to Declaration of Richard L. Priddis.

F. The Declaration of Richard L. Priddis Does Not Constitute Hearsay.

The Plaintiffs, relying in part on Knox v. Neaton Auto Prods. Mfg., Inc., assert that the Declaration of Richard L. Priddis contains inadmissible "hearsay within

[1] According to the Sixth Circuit, the existence of a license creates an affirmative defense to a claim of copyright infringement. AGT International, Inc. v. Level 3 Communications, LLC, 2002 U.S. Dist. LEXIS 21536, *10 (copy filed previously).

hearsay.[2]" The Knox case, however, is wholly inapplicable to the Plaintiffs' Motion, as it involved in relevant part - as the Plaintiffs admit - statements "overheard by a co-worker's co-worker." Knox v. Neaton Auto Prods. Mfg., Inc., 375 F.3d 451, 461 (6th Cir. 2004). Similarly, Reynolds v. Green, another case upon which the Plaintiffs rely, involved a situation where a report contained a field investigator's "understanding of the course of events at issue," and the investigator based the report on statements made by at least three other people. Reynolds v. Green, 184 F.3d. 589, 596 (6th Cir. 1999).

The Declaration of Richard L. Priddis contains no statements other than those originating from Defendant Priddis. See Declaration of Richard L. Priddis. Nowhere in his Declaration does Defendant Priddis testify that someone told him anything or that he overheard a statement from anyone. See Declaration of Richard L. Priddis. Defendant Priddis' Declaration is based entirely on his personal knowledge of the Priddis Defendants' business practices and, more specifically, of their acquisition of licenses relating to the "subject works." See Declaration of Richard L. Priddis at 1.

II. CONCLUSION

Based on the foregoing, the Priddis Defendants respectfully request that the Court deny the Plaintiffs' Motion to Strike the Declaration of Richard L. Priddis.

[2] The Plaintiffs, citing Salt Lick Bancorp v. FDIC and Silver v. Exec. Car Leasing Long-Term Disability Plan, assert that the Declaration of Richard L. Priddis (filed in opposition to the Plaintiffs' Motion for Preliminary Injunction) must set forth facts that would be admissible at trial. These opinions, however, concern exclusively a party's responsibilities when supporting or opposing a motion for summary judgment with affidavits under Rule 56 of the Federal Rules of Civil Procedure. Salt Lick Bancorp v. FDIC, 187 Fed.App. 428, 444 (6th Cir. May 30, 2006) (quoting Fed. R. Civ. P. 56(e)); Silver v. Exec. Car Leasing Long-Term Disability Plan, 466 F.3d 727, 732 (9th Cir. 2006).

Respectfully submitted,

s/ Jeff T. Goodson
Jeff T. Goodson
Law Office of John Cobb Rochford, PLLC
2200 Abbott Martin Road, # 201
Nashville, TN 37215
(615) 269-7676

Attorney for the Priddis Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic means via the Court's ECF system upon the following:

1. Timothy L. Warnock, Bowen, Riley, Warnock & Jacobson, PLC, 1906 West End Avenue, Nashville, TN 37203;
2. Paul Harrison Stacey, Law Offices of Paul Harrison Stacey, P.C., 7225 N. Spring Gulch Road, P.O. Box 4157, Jackson, WY 83001;
3. James C. Bradshaw, III, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203-1423;
4. Michael D. Hornback, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203-1423; and
5. Owen Borum, Caplan and Earnest LLC, One Boulder Plaza, 1800 Broadway, Suite 200, Boulder, CO 80302-6737.

on this the 23rd day of August, 2007.

s/ Jeff T. Goodson
Jeff T. Goodson